BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIE S. NIXON	)	
Claimant	)	
	)	
VS.	)	
	)	
BOEING COMPANY	)	
Respondent	)	Docket No. 255,799
	)	
AND	)	
	)	
INSURANCE CO. STATE OF PA.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Nelsonna Potts Barnes' Award dated November 26, 2001. The Board heard oral argument on May 10, 2002.

APPEARANCES

Claimant appeared by her attorney, Dale Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric Kuhn of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined that when claimant returned to work after her bilateral carpal tunnel surgeries she was physically unable to perform her assigned job because it exceeded her permanent work restrictions. Consequently, the ALJ determined claimant was entitled to a work disability.

Respondent argues claimant voluntarily quit a job that accommodated her permanent restrictions. And when claimant experienced pain in her hands upon her return to work she refused to seek re-evaluation of her condition with the on-site medical staff to determine if additional restrictions were appropriate. As a result, respondent argues claimant did not make a good faith effort to return to work or to allow respondent to provide other accommodated employment. Consequently, respondent argues that claimant's award should be limited to her functional impairment.

Conversely, claimant argues that when she returned to work after her surgeries her permanent work restrictions were not accommodated. When claimant attempted to work her bilateral pain returned and she resigned from employment because she could no longer perform her job duties. Consequently, claimant argues she is entitled to a work disability and requests the ALJ's decision be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This is a claim for a series of repetitive traumas to claimant's bilateral upper extremities. The parties agreed that claimant's accident arose out of and in the course of her employment with respondent. But the parties could not agree as to the nature and extent of claimant's injuries. The dispositive issue on review is whether claimant suffered a work disability in excess of her functional impairment.

In February 2000, claimant first reported to respondent that she was experiencing bilateral hand pain. On February 22, 2000, claimant was initially provided accommodated work by a reduction in the hours she would work. On March 3, 2000, claimant was referred to Dr. J. Mark Melhorn for treatment. In April 2000, claimant was provided full-time alternative work that was within her temporary restrictions. On May 19, 2000, claimant was laid off in a general plant-wide layoff.

Dr. Melhorn's diagnosis of bilateral carpal tunnel syndrome was confirmed by nerve conduction testing. After a trial of conservative treatment and temporary restrictions did not alleviate claimant's complaints, the doctor recommended surgery. On May 23, 2000, Dr. Melhorn performed a decompression of the median nerve on claimant's right wrist. On June 6, 2000, Dr. Melhorn performed a decompression of the median nerve on claimant's left wrist.

Dr. Melhorn provided permanent restrictions on August 2, 2000, which included medium work as defined by OSHA as a maximum lift or carry of 50 pounds, 25 pounds frequently with task rotation. Dr. Melhorn opined claimant suffered a 5.3 percent

impairment at the forearm of each upper extremity which he converted to a 5.3 percent whole body functional impairment.

Claimant was examined by Dr. George G. Fluter, on August 29, 2000, at the request of her attorney. Dr. Fluter concluded claimant was status post right and left carpal tunnel release with residual symptoms. Dr. Fluter also diagnosed probable Raynaud's phenomenon but concluded he could not attribute that condition to claimant's employment with respondent. Dr. Fluter imposed permanent restrictions: (1) claimant should avoid the use of knives, hooks and vibratory tools; (2) claimant should be provided appropriate thermal protection when working in a cold environment; (3) claimant should limit repetitive and forceful grasp to an occasional basis; and, (4) claimant should perform all activities using appropriate body mechanics. Dr. Fluter opined claimant suffered a 10 percent permanent partial impairment to each upper extremity which converts to a 12 percent whole body functional impairment.

Claimant was called back to work in November 2000. Before claimant was returned to work the respondent sent Dr. Melhorn a description of the essential elements of claimant's job duties as a manufacturing helper. This is the same job claimant was performing when she suffered her bilateral upper extremity injuries. In a letter dated October 26, 2000, Dr. Melhorn iterated his permanent restrictions and then noted:

> With a diagnosis of bilateral CTS it maybe appropriate to also limit power and vibratory tools depending on her specific activities to 6 hours or less per day broken into periods with rest. Each individual is unique. Additional guides based on her response to work would be appropriate. Consideration for individual risk assessment to assist in work guides would be reasonable.
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> The work activities would appear to fall within the guides as provided. Each individual brings a unique set of at risk potentials to the work environment. It is impossible to indicate within a reasonable degree of medical probability that any one individual will be able to perform a specific job after direct review. Should this individual note increasing symptoms while performing the tasks as outlined, they should be seen for additional medical follow up and care.[1]

Dr. Melhorn testified that he was concerned with hand coordination tasks requiring fine manipulation, gross manipulation, simple grasping, firm grasping and wrist rotation. And he was concerned with claimant using pliers and wire cutters. The doctor explained that if those tasks were performed in a rotation sequence that allowed claimant to use different muscle groups then such activities would fall within his restrictions. Otherwise, the doctor noted those activities might need to be modified.

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[1] Melhorn Depo., (Jul. 19, 2001) Ex. 1.

William C. Hosman, an employee of a third party vocational vendor, testified that he performs job placement for respondent's injured employees to ensure a return to work at a job within the employee's medical restrictions. After consultation with respondent's central medical as well as review of Dr. Melhorn's restrictions, he concluded claimant could return to her job as a manufacturing helper. Mr. Hosman understood that claimant's restrictions were limited to no lifting or carrying over 50 pounds, that she could frequently lift/carry up to 25 pounds, that she should rotate tasks and that she should avoid direct contact with Maskant. But Mr. Hosman was not aware of Dr. Fluter's restrictions and agreed the restrictions limiting repetitive and forceful grasp to an occasional basis would have prevented claimant from performing the manufacturing helper job.

When claimant was recalled to work she was told that there were only two positions available and because of her restrictions she did not qualify for one. Consequently, the only position available was claimant's former job as a manufacturing helper.

On November 6, 2000, claimant returned to work for respondent. She testified she was returned to the same job that she had performed when she developed bilateral carpal tunnel syndrome. Claimant developed pain and swelling in her hands which worsened as she continued to work. On the fourth day back at work the claimant told her supervisor that her hands were hurting and she was going to quit. Her supervisor persuaded claimant to wait and talk to personnel the next day before making any decision.

The following day the claimant met with her supervisor, Harold D. Coleman, and the personnel representative from human resources, Carolyn Ann Jordan. Claimant testified that respondent did not offer to change her job duties and she was only given the options of either a medical layoff or quitting and that she was advised to quit because that would be easier than the long drawn out process of a medical layoff.

Mr. Coleman and Ms. Jordan denied they told claimant she should quit instead of going to central medical. Ms. Jordan testified claimant was advised she again needed to document her problems with central medical before any action could be taken. Ms. Jordan testified that there was a discussion of the accommodation process but claimant kept saying she did not want the hassle of the accommodation placement. Claimant was told that Bill Hosman could work an accommodation placement. Despite this offer the claimant ultimately decided to quit.

The dispute in this case concerns the application of the work disability standards set forth in K.S.A. 1999 Supp. 44-510e. Each party phrases the issue somewhat differently. The differences in their descriptions of the issue, in effect, state their argument. Respondent states that the issue is whether a claimant should be entitled to work disability if she quit employment without requesting further accommodation and without medical direction. Claimant, on the other hand, states that the issue is whether the job exceeded claimant's restrictions and, if so, did respondent make a reasonable offer of accommodation.

The statutory language at issue is the language found in K.S.A. 1999 Supp. 44-510e which states:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

However, K.S.A. 1999 Supp. 44-510e(a) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

If claimant refuses to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[2] Even if accommodated work is not offered, claimant still must show she made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to claimant based on the evidence in the record as to claimant's earning ability.[3]

Claimant initially made a good faith effort to return to her former employment. Although she expressed her concerns about returning to the same job, she nonetheless attempted to perform that job. There were no accommodations to the manner that she would perform the job because respondent had concluded her former job duties were all within claimant's permanent restrictions imposed by the treating physician, Dr. Melhorn. Although claimant was given somewhat different restrictions by Dr. Fluter, those were not presented to respondent.

But when claimant began to experience pain in her wrists she decided to terminate her employment with respondent rather than go back to central medical and be provided accommodated employment. And claimant agreed that she could not say that respondent would not have been able to provide her an accommodated job.[4]

Mr. Hosman opined that if claimant had gone to central medical and been provided additional restrictions there was a greater likelihood than not that he could have placed claimant back into a job. Mr. Coleman noted that if claimant had gone to central medical

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] R.H. Trans., at 30-31.

she probably would have been removed from performing her manufacturing helper job and there would have been an attempt to place her in a different job.

Ms. Jordan noted that if claimant had gone back to central medical there was the option that respondent could again accommodate her. Claimant was told that by again contacting Mr. Hosman, he would be able to find an accommodation placement. But Ms. Jordan agreed that if claimant had gone to central medical and no additional restrictions would have been imposed then claimant would have remained in her position as a manufacturing helper.[5] And Ms. Jordan told claimant that if Mr. Hosman could not find her work, then she could be taken before the review board and medically laid off.[6]

The Board concludes claimant's decision to quit her employment with respondent without attempting to follow the procedure to obtain accommodation was the equivalent of rejecting accommodated employment at a comparable wage. Claimant could, and most likely would, have been retained in work appropriate to her injury but chose to quit. The respondent demonstrated that ability when claimant was initially injured. The Board therefore concludes the wage claimant was earning and would have continued to earn had she continued working for respondent should be imputed to her. As this was at least 90 percent of her average weekly wage, claimant's permanent partial general disability award is based upon her permanent functional impairment.[7]

The Board, in this instance, finds Dr. Fluter's opinion more persuasive and adopts his determination that claimant suffers a 12 percent permanent partial functional impairment.

AWARD

WHEREFORE, the Board finds that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 26, 2001, is modified as follows:

Claimant is granted an award of workers compensation benefits from respondent and its insurance carrier for an accidental injury and resulting disability suffered in February 2000 through mid-April 2000. Claimant is entitled to receive 35.90 weeks of temporary total disability compensation at $383 per week, or $13,749.70, followed by 47.29 weeks of permanent partial disability compensation at $383 per week, or $18,112.07, for a 12 percent permanent partial general disability and a total award of $31,861.77, all of which is due and owing and is ordered paid in one lump sum less any amounts previously paid.

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[5] Jordan Depo., at 25.

[6] Ibid, Ex. 1.

[7] See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

IT IS SO ORDERED.

Dated this _____ day of April 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale Slape, Attorney for Claimant
Eric Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna P. Barnes, Administrative Law Judge
Director, Division of Workers Compensation